

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Review of the Commission’s Broadcast and)	MB Docket 98-204
Cable Equal Employment Opportunity Rules)	MB Docket 16-410
and Policies)	

To The Commission

**COMMENTS OF THE MULTICULTURAL
MEDIA, TELECOM AND INTERNET COUNCIL**

INTRODUCTION

The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully submits these Comments in response to the December 12, 2016 Petition for Rulemaking (“Petition”) filed by Sun Valley Radio, Inc. and Canyon Media Corporation (collectively “Sun Valley”). The Petition asks the Commission “to allow broadcasters, if they so choose, to rely on Internet recruitment sources, coupled with their on-air advertising, when conducting outreach for new job openings.”¹ Sun Valley states that it is not asking the Commission “to cut back on the underlying obligations to recruit for job openings. Instead, it is meant to recognize the realities of today’s employment marketplace – that recruiting is done online[.]”²

¹ Petition, p. i (Summary).

² *Id.*, p. 1.

MMTC ENDORSES SUN VALLEY'S PROPOSAL WITH THREE CAVEATS

MMTC commends Sun Valley for framing its proposal in a way that recognizes the continued importance of broad recruitment, and that strives to make that process more efficient and effective.³

Sun Valley is correct that in the past decade, virtually all professional job search is now done online.⁴ Indeed many broadcast job announcements already specify that applications are only accepted online. Online search does not impede diversity: as Sun Valley points out, minorities use

³ The Commission put Sun Valley's proposal out for comment three days after it was offered. That was entirely appropriate. But by contrast, 48 national organizations, led by MMTC, have been waiting nearly 14 years for action on some of their EEO reform proposals. Our February 6, 2003 Petition for Clarification, or in the Alternative, for Partial Reconsideration of *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Report and Order)*, 17 FCC Rcd 24018 (2002) ("*Second R&O*") remains pending in MB Docket 98-204. Our Petition asked the Commission to consider statistical evidence of industry-wide EEO noncompliance, and to reverse a decision to allow even very large broadcasters serving rural America to perform only two, rather than four of the sixteen possible outreach initiatives every two years. Subsequent MMTC proposals were also ignored: *see* MMTC Letter to Julius Genachowski, MB Docket 98-204, re: Request for Three Month Suspension of the Broadcast EEO Rule Upon the Passage of a Year with No EEO Enforcement (June 29, 2010) (recommending, *inter alia*, staff analysis of Form 395 data to determine whether licensee workforces are homogeneous when it appears that the licensee recruits primarily by word-of-mouth, and convening of a hearing under 47 U.S.C. §403 to determine how minorities came to be virtually purged from radio journalism and why minority representation in television journalism is in decline.) We are not alone in having our EEO reform proposals ignored: the FCC's (former) Advisory Committee on Diversity for Communications in the Digital Age adopted, by unanimous vote, a recommendation for the restructuring of recruitment sources to emphasize training and mentoring and de-emphasize recruitment, given the shrinking size of the industry. *See* Recommendation for a Regulatory Initiative for Career Advancement (December 10, 2004), available at <http://www.fcc.gov/DiversityFAC/recommendations.html> (follow link "EEO Rule") (last visited January 23, 2017). Over 12 years later, the agency still has not acted on this proposal by its own expert advisory body.

⁴ *Petition*, p. 1. In 2002, MMTC and other civil rights organizations were willing to authorize the use of internet recruitment in some circumstances, but due to low minority broadband adoption at the time, we were not prepared to recommend it as a primary recruitment source. *See* Comments of EEO Supporters, MB Docket 98-204 (April 15, 2002), p. 113. Today, wireless adoption is significantly higher but minorities still lag in home and computer usage of broadband.

wireless broadband more than non-minorities do to search for employment.⁵ Indeed, broadcast job applicants must have online proficiency.

Thus, MMTC is pleased to endorse Sun Valley's proposal, with these three caveats:

First, the Commission should ensure that an online search mechanism enables applicants who are not part of an incestuous "old boy network" of predominately word-of-mouth recruitment from homogeneous workplaces⁶ to easily find broadcast job notices when they are posted online. That means that the online postings must use common natural search terms like "broadcast jobs", so they will not be hidden in the all-too-common online "echo chambers" that now separate us from one another online.⁷ That is especially critical if the licensee chooses to post its openings only on its own website, which might not be frequented by job applicants unfamiliar with its station. Further, implicit in the principle of ease of use is that the job postings must be available to the public at no charge.

Second, the Commission should strongly emphasize that online job postings are not perfunctorily posted for a short period of time to cover the fact that a candidate has already been pre-selected from the old boy network. In our experience, this is an all-too-common practice, and one that the Commission is ill-equipped to prevent.. One way the Commission can help put an end to this "pre-select, then post" game is to expect licensees to maintain auditable records of interviews with qualified candidates – a businesslike step that is not burdensome since interviews produce more qualified employees. In this regard, the Commission ought to commend for its regulatees'

⁵ See *id.*, p. 7 and n. 30.

⁶ See, e.g., *Jacor Broadcasting Corp.*, 12 FCC Rcd 7934, 7939 ¶14 (1997) and *Walton Broadcasting, Inc.*, 78 FCC2d 857, 875, *recon. denied*, 83 FCC2d 440 (1980).

⁷ See, e.g., Nicholas DeFonzo, The Echo Chamber Effect, The New York Times, April 21, 2011, available at <http://www.nytimes.com/roomfordebate/2011/04/21/barack-obama-and-the-psychology-of-the-birther-myth/the-echo-chamber-effect> (last accessed January 23, 2017).

voluntary consideration the National Football League’s “Rooney Rule,” which, when translated into the corporate world, mandates diverse hiring pools for management positions.⁸

Third, the Commission should not allow broadcasters to use the impersonal nature of online postings to insulate themselves from the personal contact with job sources and candidates that typically is the primary route to career advancement in a personality-based industry like broadcasting. Thus, while broadcasters can be encouraged to use the internet to search for many applicants, broadcasters must also be encouraged to continue to cultivate job referral relationships with resources that are likely to include diverse candidates, including but not limited to HBCUs and community colleges, LULAC, NOW and Urban League chapters, and outstanding industry resources such as the NAB’s Media Sales Institute and Broadcast Leadership Training Program.⁹

**THE COMMISSION SHOULD CONDUCT A COMPREHENSIVE,
HOLISTIC REVIEW OF ITS EEO COMPLIANCE PROGRAM**

EEO compliance is essentially the only public service the Commission requests of radio stations, and one of very few public services required of television stations and MVPDs. That is why it is essential that the Commission administer EEO regulations that regulatees will value and implement. EEO regulations must never be perceived as so innocuous that no one could ever be sanctioned for violating them, or so costly or burdensome that they are perceived to be unfair.

It is clear that race and gender discrimination create a market failure that impedes competition. As then-Commissioner Kevin Martin explained in 2002 when the Commission adopted the EEO rules currently in effect:

⁸ See Brian W. Collins, Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule, 82 NYU L. Rev. 870 (2007), available at <http://www.nyulawreview.org/issues/volume-82-number-3/tackling-unconscious-bias-hiring-practices-plight-rooney-rule> (last accessed January 23, 2017).

⁹ As the EEO Supporters put in in 2004, broadcasters should maintain personal contact with “those traditionally excluded from broadcasting” – those who are “outside the old boy network.” See EEO Supporters, Partial Opposition to Joint Petition for Reconsideration, MM Docket No. 98-204, March 5, 2004, p. 2.

By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved programming, which ultimately benefits all consumers. *The program we adopt today therefore should promote not just diversity, but also true competition* (emphasis supplied)).¹⁰

Additionally, race and gender discrimination are so deep an affront to the public interest upon which the Communications Act is premised that they absolutely disqualify an applicant from holding an FCC license.¹¹ Since the FCC adopted its first nondiscrimination rule in 1968,¹² the full inclusion of minorities and women in the mass media has proven essential to cross-cultural consciousness, to the diversity and strength of our national culture, and to the vitality of our democracy. By seeking to curtail the tradition of exclusionary word-of-mouth recruitment that is so common in close-knit industries like broadcasting and cable, the Commission's EEO rules have helped ensure that these mass media industries are held to the highest standards of enlightened business in providing equal opportunity.

The question of whether broadcasters may use the internet for job search is but a modest part of the greater questions of whether the Commission's EEO enforcement program meets the public interest test Congress has assigned to it the Commission,¹³ and whether the EEO regulatory program satisfies the basic standards of cost-benefit analysis. To answer these questions, we must review the entire open EEO docket, MB 98-204.

¹⁰ See *Second Report and Order*, 17 FCC Rcd at 24129 (Separate Statement of Commissioner Kevin Martin); see also Comments of EEO Supporters, MM Docket 98-204, April 15, 2002, pp. 24-29 (demonstrating that the EEO rule is justified to promote competition since labor is a key input into production and artificial restrictions on the availability of labor would impair the competitiveness of firms and of the industry as a whole.)

¹¹ See, e.g., *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *1968 Nondiscrimination Order*, *supra*.

¹² *Nondiscrimination in the Employment Practices of Broadcast Licensees (MO&O and NPRM)*. 13 FCC2d 766 (1968) ("1968 Nondiscrimination Order").

¹³ See 47 U.S.C. §§334 and 554.

Although the Bureau has placed the Sun Valley Petition into a new docket, the primary EEO docket, MB 98-204, is still very much open. Created in 1998 in response to the *Lutheran Church* decision,¹⁴ which struck down the EEO recruitment rules, the docket saw the Commission adopting new rules in 2000,¹⁵ seeing those rules also struck down in 2001,¹⁶ then in 2002 adopting yet another set of rules.¹⁷ Elements of the 2002 rules are also under challenge in three 2003 petitions for reconsideration or clarification, including one filed by MMTC and dozens of other civil rights organizations.¹⁸ Subsequent additional EEO reform proposals by MMTC and others have also gone unanswered.¹⁹

Indeed, the Commission has allowed its EEO enforcement program to languish with virtually no meaningful oversight since 2002. The program is long overdue for a fresh look. Among the issues pending in Docket MB 98-204, or otherwise worthy of consideration due to subsequent regulatory or technological events, are the following:

¹⁴ *Lutheran Church/Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *petition for rehearing denied*, 154 F.3d 487, *petition for rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

¹⁵ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Report and Order)*, 15 FCC Rcd 2329 (2000), *recon. denied*, 15 FCC Rcd 22548 (2000).

¹⁶ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *petition for rehearing and rehearing en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom. MMTC v. FCC*, 534 U.S. 1113 (2002).

¹⁷ *Second R&O*, *supra*.

¹⁸ *See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings (Public Notice)*, Report No. 2596 (March 3, 2003). MMTC's petition is described in n. 3 *supra*.

¹⁹ *See* n. 3 *supra*.

A. Universal EEO Coverage of Regulatees.

Platform neutrality and the elimination of silos should lead naturally to EEO enforcement across all media and telecom industries, including “edge” firms the FCC classifies as Title I information services. Many of these firms, including most of the largest ones, maintain very low levels of African American, Latino, and female employment, as well as limited Asian American managerial employment – far below those of comparable broadcast and telecom firms.²⁰ Since the Commission probably lacks EEO enforcement authority over information services, the Commission should ask the Department of Labor and the EEOC to take steps to ensure that these firms’ EEO policies are brought up to FCC media EEO standards.

B. Identification and Prosecution of Discriminators.

The Commission has long recognized that the predominant use of word-of-mouth recruitment from a homogeneous workplace evidences intentional discrimination.²¹ Yet the Commission’s audit program only examines one of these two elements – whether recruitment is predominately word-of-mouth. It never looks at whether the workplace from which the recruitment is performed is homogeneous.²² As a result, although the EEO rule is aimed at preventing discrimination, the audit program is incapable of ever apprehending a discriminator. The EEO staff is capable of asking a licensee for evidence of both elements of a licensee’s discriminatory conduct but, incredibly, it is blind to one of the elements: workplace homogeneity, from which the other element – word-of-mouth recruitment – emanates. Just as unfortunate is the fact that the audits often result in huge sanctions and legal fees for broadcasters – including minority owners – with heterogeneous workplaces but predominant word-of-mouth recruitment. Not only is this practice by a diverse employer not discriminatory, it may in many cases promote diversity. This might explain why the audit program is not widely supported by the industry.

²⁰ See MMTc Letter to Hon. Tom Wheeler re: Diversity and EEO in the Tech Sector, September 16, 2014, available at <http://mmtconline.org/wp-content/uploads/2014/09/MMTC-Tech-EEO-Ltr-091614.pdf> (last accessed January 23, 2017) (providing statistics on workforce by gender and ethnicity for eight major edge firms, and requesting Commission intervention).

²¹ See *Jacor*, *supra*, and *Walton*, *supra*.

²² This critical omission arises because the Commission has failed to make the Annual EEO Report, Form 395, available even to Commission staff *in camera* for enforcement purposes. See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Third R&O and Fourth NPRM)*, 19 FCC Rcd 9973, 9977 ¶9 (2004) (“*Third R&O*”) (“The Commission will not use the data in the reports to screen renewal applications or to assess compliance with our EEO regulations.”) In the *Third R&O*, the Commission supplies no logical reason why it refuses to gather and use information that – in conjunction with recruitment information – would readily identify a licensee that is engaging in prohibited race or gender discrimination.

C. EEO Activities Evaluation.

The Commission generally performs its duties based on current data – except when it comes to diversity. Although it is authorized to collect annual employment reports from broadcasters and MVPDs,²³ it does not collect or publish aggregate data on the employment of minorities and women. This data – as well as data on the promotion and retention of minorities and women in media, telecom and high tech industries that share the same hiring pools – is essential if the Commission is to prescribe the ideal balance of pro-active activities including recruitment, mentoring, training and retention. The simple act of gathering and aggregating this data would in no way “pressure” any licensee to make unlawful hiring decisions.

D. Audit Reform.

The Commission should evaluate its audit program to ensure that audits are able to verify that hiring decisions were made *after* the job postings were made, and not before-hand,²⁴ that audits are able to uncover discrimination at the points of recruitment, interviewing, and selection, and that audits will no longer falsely accuse those who have done nothing wrong and impose upon them considerable forfeitures and legal costs. The assessment should also consider whether the staff assigned to EEO enforcement (presently less than one-third the staff size of 20 years ago) is sufficient,²⁵ and whether EEO enforcement paradigms in use at the FCC are consistent with those in use in other federal EEO programs.²⁶

²³ See *Third R&O* at 9976-77.

²⁴ See p. 3 *supra*.

²⁵ The EEO staff is absurdly small relative to the responsibilities assigned to it. Fortunately, the EEO staff is also dedicated and highly competent.

²⁶ A prime example can be found in the work of the Office of Civil Rights of the U.S. Department of Education, which ensures that racial discrimination is not practiced by public school systems inasmuch as such discrimination is a key factor in school segregation. See *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

E. Venue of Enforcement Staff.

As it pledged to do on remand from *Prometheus III*, the Commission should determine whether EEO enforcement would more effectively and efficiently be performed by the Enforcement Bureau.²⁷ We further recommend that in the interest of efficiency and consistency, all of the nondiscrimination enforcement programs – procurement, transactions, advertising, and employment – be housed in a new Civil Rights Section of the Enforcement Bureau.

CONCLUSION

The Commission should not regard the question posed by Sun Valley’s Petition – how broadcasters can use the internet search for job postings – as the end of the agency’s consideration of EEO. Instead, Sun Valley’s Petition should mark beginning of a long-overdue comprehensive and holistic modernization and upgrading of the Commission’s long-neglected EEO compliance and enforcement program.

Respectfully submitted,

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²⁷ See 2014 *Quadrennial Review*, MB Docket No. 14-50, *Second Report and Order*, 31 FCC Rcd 9864, 10008 ¶333 (on remand from *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (“*Prometheus III*”), acknowledging that “enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau’s existing mission and expertise in the enforcement of the Commission’s regulations” and directing several bureaus and offices “to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.”)